A

SABAH MEDICAL CENTRE SDN BHD

v.

SYARIKAT NEPTUNE ENTERPRISE SDN BHD & ANOR

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[CASE NO: KK-24-133-2011]
3 OCTOBER 2011

C

ARBITRATION: *Arbitrator - Revocation of appointment - Whether arbitrator's negative and baseless remarks about plaintiff's claim showed biasness against respondent - Whether inappropriate for arbitrator to continue with proceedings and determine final award - Whether real possibility arose or danger arose since arbitrator already made up his mind against plaintiff's claim*

D

The second defendant was the arbitrator in a claim brought by the first defendant ('Syarikat Neptune') against the plaintiff ('SMC'). The arbitrator handed down an interim award ordering SMC to immediately pay Syarikat Neptune a sum of RM8,651,062.27 while postponing his determination of SMC's set-off claims against Syarikat Neptune to be made in his final award. SMC made the instant application to terminate the arbitrator's appointment forthwith for being biased against SMC. SMC's set-off claim against Syarikat Neptune for liquidated and ascertained damages ('LAD') amounted to RM2,128,000 while its set-off claim for defects amounted to RM7,715,145.75. If SMC succeeded on these claims in the final award they would extinguish the amount ordered to be paid under the interim award. SMC doubted the arbitrator's independence and impartiality in determining the final award because he had expressed several negative and baseless opinions regarding its claims during the course of the proceedings as well as in the interim award.

E

F

G

Held (allowing application):

(1) It was inappropriate for the second defendant to continue to hear and decide the dispute between SMC and the first defendant as there was a real danger of bias on his part. (para 14)

H

(2) The arbitrator's adverse comments and conclusions that SMC's claim was "inequitable" and questioning its *bona fides* were all made in the circumstances where evidence on the issue of LAD had yet to be adduced and submissions made. Similarly on the issue of defects, the arbitrator's conclusion that the first defendant had no liability to undertake defects repair works on the ground that the

I

architect did not give it a deadline to do so was improper when evidence on the issue of defects was incomplete and submissions were yet to be made. (paras 9 & 11)

(3) Even though the arbitrator in his interim award had assured that he had not made up his mind on the issues relating to the set-off claims, his negative predisposition would be difficult to be displaced and SMC should not be put through a hearing which appeared to be predetermined. There was a real possibility that the arbitrator had already made up his mind against SMC on the issues in the final award. At the very least, there was a real possibility or danger that he would not be able to approach the issues with an open mind. (paras 10 & 13)

Case(s) referred to:

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Henderson v. Henderson [1843] 3 Hare 300 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

Secretary to the Government, Transport Department v. Munuswamy Mudaliar AIR 1988 SC 2232 ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 13(7)

Rules of the High Court 1980, O. 42 r. 8

For the plaintiff - Mohandass Kanagasabai (Marina Tiu with him); M/s Yap Chin & Tiu

For the 1st defendant - Norbert Yapp; M/s Norbert Yapp & Assocs

For the 2nd defendant - Catherine Chau; M/s Catherine Chau & Assocs

Reported by Ashok Kumar

JUDGMENT

Abdul Rahman Sebli J:

[1] This is an application by the plaintiff, Sabah Medical Centre Sdn Bhd ("SMC") for an order that the 2nd defendant's appointment as arbitrator in the dispute between them and the 1st defendant be terminated with immediate effect. At the arbitration proceeding the 1st defendant was the claimant and SMC, the respondent. The arbitrator has delivered his decision on the Interim Award, ruling that SMC is to

immediately pay the 1st defendant a sum of RM8,651,062.27 and is due to hear SMC's set off claims against the 1st defendant. Basically the grounds relied upon for the removal of the arbitrator are these:

(a) The plaintiff has lost confidence in the 2nd defendant's ability to conduct the arbitration proceedings impartially and independently and that a fair and just hearing will not be possible;

(b) The plaintiff has not been treated with equality and given a fair opportunity to present its case, rendering a fair hearing of the dispute impossible.

[2] Bias or lack of impartiality is a predisposition to decide for or against one party without proper regard to the true merits of the dispute: see *Secretary to the Government, Transport Department v. Munuswamy Mudaliar* AIR 1988 SC 2232. The language and observations made by judges (and this includes arbitrators) may be a ground on which bias may be inferred: see the judgment of Richard Malanjum CJ (Sabah & Sarawak) in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725 FC.

[3] The test for the discharge of an arbitrator is a "real danger of bias" and the threshold is a low one - only a possibility needs to be shown, not a probability: see *R v. Gough* [1993] AC 646; *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65.

[4] Both written and oral submissions were made by the parties at the hearing. Having considered the arguments of both sides carefully, I agree with SMC that there is a real danger or possibility (they mean the same thing) of bias on the part of the arbitrator. The arbitrator (2nd defendant) had rightly refrained from taking part in the arguments and leaving the matter to the court as he was the sitting arbitrator in the arbitration proceeding between SMC and the 1st defendant which was still ongoing as at the date of hearing. The submissions made on behalf of SMC shall form the basis of this judgment. The argument is as follows.

[5] In his rulings made in the course of the hearing and in his Interim Award, the arbitrator made it clear to the parties that:

(a) SMC's set-off claim in respect of the liquidated and ascertained damages (LAD) amounting to the sum of RM2,128,000 should be decided separately in the final award;

(b) SMC's set-off claim for the defects amounting to the sum of RM7,715,145.75 should also be decided separately in the Final Award.

[6] Obviously these are large claims which would extinguish completely the Interim Award given in favour of the 1st defendant if SMC were to succeed in the Final Award. SMC's fear is that the arbitrator will not be impartial or may be biased in determining the Final Award because he has expressed certain opinions about these claims in his Interim Award. In particular, in respect of the LAD claim the arbitrator made the following observations:

(a) "Since the respondent admitted it is at fault in the delay in handing over site possession on Ph.II, it would be inequitable to deduct LAD from the claimant based on the respondent's bare assertions" (para. 271(a) of the Interim Award).

(b) "What was the basis for the architect only granting 25 days EOT when site possession for Ph.II works was delayed by 16 weeks?" (para. 271(c) of the Interim Award).

(c) "Surely, if LAD was indeed due to the respondent, why did the respondent not begin to set-off and recover the LAD from the Interim Certificates 31, 32 and 33?" (para. 271(e) of the Interim Award).

[7] In respect of the claim on defects he made the following observations:

(a) "Since the claimant was terminated before the end of the DLP, the alleged defects will only be up to the date of termination as the claimant will no longer have the ability to rectify the defects after vacating the site" (para. 322 of the Interim Award).

(b) "What merely happened was that the architect (RW1) compiled a list of defects after the claimant had left the site and introduced the various defects as evidence from the respondent's bundles. Further, it is clear that once the defect was discovered before the end of DLP, it was not referred to the claimant after it left the site. Thus, without a defects list at the date of the claimant's termination from the architect, given to the claimant and giving the claimant a deadline to complete those defects, it does not establish that the claimant refused to undertake defects rectification works" (para. 349(iii) of the interim award).

[8] These comments should not have been made because the arbitrator himself had ruled that all evidence pertaining to the matter is to be heard in the final award. By these comments and observations SMC has reasonable grounds to conclude that:

(a) The arbitrator has decided that it would be "inequitable" to deduct the LAD. He has also concluded that SMC's LAD claim is a "bare assertion" although supported by an architect's certificate of non-completion.

(b) By questioning the architect's basis for granting a 25 day extension, the arbitrator does not believe that the architect's decision is a correct one.

(c) The arbitrator is questioning the *bona fides* of the LAD claim when he said "surely if LAD was indeed due to the respondent why did the respondent not begin to set-off LAD from Interim Certificates".

[9] The arbitrator's adverse comments and conclusions that SMC's claim is "inequitable" and questioning the *bona fides* of the claim were all made in circumstances where evidence on the issue of LAD has yet to be adduced and submissions made.

[10] SMC is understandably alarmed by these views, expressed as they were in such intemperate language, questioning the credibility and *bona fides* of SMC's claim. There is to my mind a real possibility that the arbitrator has already made up his mind against SMC on these issues in the Final Award. At the very least there is a real possibility or danger that he will not be able to approach the issues with an open mind.

[11] The arbitrator's finding on the issue of defects further shows that he has already concluded that the 1st defendant has no liability to undertake defects repair works on the ground that the architect did not give the 1st defendant a deadline to do so. It is improper to make this kind of finding when evidence on the issue of defects is incomplete and submissions have yet to be made.

[12] It was contended by counsel for the 1st defendant that the plaintiff should not complain about the arbitrator's comments and observations as it was the plaintiff themselves who raised the issue of set-off extensively at the hearing before the arbitrator, making it necessary for the arbitrator to deal with the issue in coming to his decision on the interim award. The point is validly taken but where, as here, evidence on a contested issue is still pending and submissions have yet to be made, it is grossly unfair for the arbitrator to question the *bona fides* of SMC's claim. It is to pass judgment without having all the facts.

[13] In his interim award the arbitrator assures that he has not made up his mind on issues relating to the set-off claims. This is cold comfort to SMC because by having those negative thoughts at the back of his mind, there is a real possibility that the arbitrator has prefixed his conclusions on the *bona fides* of SMC's claims. Such negative predisposition will be difficult to displace and SMC should not be put through a hearing which appears to be predetermined. It strikes at the very heart of the rule that no person shall be condemned unless given the opportunity of being heard: *Ridge v. Baldwin* [1964] AC 40. In *Metramac*, *supra*, the Federal Court held that language by a judge suggesting that careful consideration has been given does not preclude scrutiny of the judgment for bias.

[14] For reasons aforesaid I am of the view that it is wholly inappropriate for the 2nd defendant to continue hearing and deciding the dispute between SMC and the 1st defendant. There is to my mind a real danger of bias on his part. Accordingly the plaintiff's application was allowed in terms of the originating summons dated 27 June 2011.

[15] As a footnote, I should perhaps mention that at the hearing of the application on 8 August 2011, no reference was made by any party to s. 13(7) of the Arbitration Act, 2005. It was only brought up later when the 1st defendant *vide* letter dated 9 August 2011 requested for an appointment pursuant to O. 42 r. 8 of the Rules of the High Court 1980 to "correct" the order made in relation to prayer (2) of SMC's originating summons. In deference to the 1st defendant, I granted the request and all parties were invited to present their arguments on 18 August 2011. SMC opposed the application and after hearing arguments from all three parties, I declined the application principally on the ground that the point raised by the 1st defendant could and should have been argued at the hearing of the originating summons but was not. There must be finality in litigation: *Henderson v. Henderson* [1843] 3 Hare 300; *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 CA.